

am myself inclined to agree with Lord Craighill that the better view is that they do not. In point of fact the ship was stranded on the west coast of India, and at the beginning of the monsoon, which blows steadily from the end of May till the beginning of October, she was driven on soft sandy beach, and did not suffer much injury. The question then was about getting her off. There was quite a good chance of doing this, for the monsoon was not yet due. However, she was not got off, the monsoon began blowing, and then it was needless to try again till the wind had subsided at the beginning of October. Accordingly, when the underwriters were informed, by notice of abandonment, of total loss, they said "The notice is premature, and there is still a good chance of the vessel being got off." I think this was a very reasonable answer for them to make. The result might quite justify such a view, and in point of fact it did, and the balance of evidence is to the effect that these expectations, which were ultimately justified by the event, were quite reasonable, and there is no doubt that the owners should have waited and renewed their efforts. Therefore, though not without some difficulty, I agree with Lord Craighill's view of this part of the case, and I further think that that disposes of the case, for, as I have said, the ship was got off, and by the 15th of December. She was presented to the owners completely repaired at a cost of £1400. The Sheriff in his note says—"The vessel was got off and repaired for a total cost of about £1400, and pursuer's own witness Captain Cooper places her value when offered to the owner at £6000, or about two-thirds of her original cost." Then that being so, the insured are entitled to partial loss only. But along with the many perplexing things in this, I may call it, multitudinous case, no attention whatever has been paid to it in all these processes as a case of partial loss, and I suppose further litigation will result. The underwriter must pay, and the question is whether on total or partial loss, and I should have thought that the case might in a less bulky form have been prosecuted to ascertain this, but the action being raised for total loss the other matter is not entered on.

Now, if the conclusion arrived at by Lord Craighill—and in which I concur—be right, viz., that there has been no constructive total loss, of course the question does not arise as to whether such loss is to arise at the time of notice of abandonment or at the time of raising the action, but I may say on this matter, which I repeat does not arise on the verdict of the facts which we have returned, hypothetically my opinion inclines to that expressed by Lord Craighill, and I think that there may be found to be grounds for distinguishing between the cases of capture, which is specially insured against in every policy of insurance, and damage to a ship, which latter is the case we are considering here. However, while expressing the inclination of my opinion on this point, I reserve my definite opinion, as according to the verdict which we have returned on the facts in the present case the question does not arise.

LORD JUSTICE-CLERK — I concur with your Lordships, and have really nothing to add. But on this last point I think that if we were called on to give any decision a great deal would have to be considered. However, I think that specific

restitution must always exclude, and this principle may distinguish the cases of capture and a case like the present where restitution is impossible.

The Court found that there had been no constructive total loss, and affirmed the Sheriff's interlocutor.

Counsel for Appellant — Asher — Guthrie. Agents—Maconochie & Hare, W.S.

Counsel for Respondent—Dean of Faculty (Kinnear)—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, January 26.

SECOND DIVISION.

[Lord Lee, Ordinary.]

SMITH v. SCOTT & BEST.

Implied Contract—Sub-Contract—Conduct which Induces Third Parties to Believe that there is an Implied Authority to Pledge another's Credit.

A contractor employed a person in insolvent circumstances to execute a portion of the work contracted for, and supplied him with some of the materials for doing so. He took no steps to prevent this person from being considered his foreman, with power to order materials, and a belief to that effect became current in the district. The person thus employed having absconded without paying for certain furnishings made for the work at which he was engaged, the person who had made them sued the contractor for his account. He defended himself on the ground that the work had been done under a sub-contract, and that the person who had ordered the materials had no power to pledge his credit. *Held* on a proof that there had been no sub-contract, and that the defender had so acted as to incur liability for the pursuer's account—Lord Young *diss.* on the ground that there had been a sub-contract to do the work, and that therefore the defender was not liable.

Messrs Scott & Best, contractors, Leith, were contractors for the formation of certain water-works for the Forfar Water Commissioners. In August 1879, while these works were in progress, a man named Alexander Cameron came to Mr Best, one of the partners of the firm of Scott & Best, and asked him to give him work. Best said he had no work at Leith then, but mentioned the work at Forfar, and offered him work there. He was aware that Cameron was then without funds, but Cameron told him that he expected shortly to be in possession of several hundred pounds. What passed between Best and Cameron at this interview, as related by the former and Mr Gray, inspector of works, Leith, who was present, was as follows:—Best showed Cameron the schedule of work at the Forfar water-works, which included the construction of a bridge over the Esk at Justinhaugh at a cost of £213, 8s. Cameron after becoming acquainted with the measurements and nature of the work at this bridge said, "I will give you £40 for your contract." Best told him to take care and think again, and he then repeated that he would give £40 for the

contract. Mr Gray stated with regard to this interview that he understood at the time that Cameron was "wanting a job—anything to keep him off the streets." After this meeting Best wrote to his foreman at Forfar that he had arranged with Cameron to do the work at Justinhaugh for £40 less than schedule prices, and that he was to allow him to have cement at cost price, and anything else he might require, keeping a note of all he got. Cameron went to Justinhaugh and began work at the bridge, where he remained till November following. During that time he received payments from Scott & Best in proportion to the amount of work done, and paid the men whom he employed, except for the last fortnight previous to his departure in the end of November. During this time also the letters passed between Best and his foreman at Forfar which are referred to in the opinions of the Judges, *infra*. In the first week of November Cameron called on John Smith, tenant of a stone-quarry near Kirriemuir, and told him that he was foreman to Scott & Best, whom Smith knew to be contractors for Forfar Water-works, and that he required stones for the bridge at Justinhaugh, which Smith knew to be a part of that contract. In consequence of that representation Smith supplied the stones, on the understanding that thereby he was becoming a creditor of Scott & Best. He deponed in this action that if he had been told Cameron had a sub-contract from Scott & Best for building the bridge he would not have supplied the stones without security. "It was entirely because of his (Cameron's) statement that I gave the supplies."

In the end of November Cameron deserted the work and disappeared, leaving Smith unpaid. At that time, according to the evidence of Scott & Best's foreman, Cameron had been paid for all the work he had done and for the materials on the ground. Scott & Best then finished the work, obtaining stones for the purpose from a Mr Watson. They paid the wages left unpaid to his workmen by Cameron, without, as they alleged, admitting any liability, but out of charity and good feeling. They declined to pay Smith for the stones ordered by Cameron, on the ground that they had already paid Cameron for all the work done and materials supplied by him, and that they were not responsible for representations made without their knowledge or consent that he was entitled to bind them.

Smith then raised this action, and pleaded—"(1) The pursuer having supplied the said stones to the defenders, or their authorised representative, and the stones having been used for the defenders' works, the pursuer is entitled to decree against them for the sum sued for. (2) The said Alexander Cameron having held himself out to the pursuer as the authorised representative of the defenders, and the pursuer having had reasonable and sufficient ground for believing him to be so, and having supplied the said stones in that belief, the defenders are bound to pay the pursuer the sum concluded for."

The defenders pleaded—"(2) The account sued for not having been incurred to the pursuer by the defenders, or anyone for whom they are responsible, the defenders are entitled to absolve."

After a proof, in which the facts above set out were disclosed, and it also appeared that there

had been a belief in the district that Cameron was a foreman with Scott & Best, the Lord Ordinary (LEE) pronounced an interlocutor finding, *inter alia*, as a matter of fact—" (5) That the said stones were supplied on the credit of the defenders, and were used in the construction of the said bridge; (6) That Cameron went on with the work until 27th November 1879, by which time the whole of the excavations and concrete work had been completed, and a considerable portion of the walling and arching had been done, to the value in all of £130, 15s. according to schedule prices, conform to the statement by defenders' engineer, and Cameron had received from the defenders payments to account amounting in all to £96 as per receipts; (7) That Cameron having on or about 26th November left the place, the work was taken up by the defenders and completed by them, partly with stones cut and supplied under Cameron's said orders, and payment for the whole work according to the schedule prices was received by them from the Police Commissioners; (8) That the stones supplied as aforesaid have not been paid for; (9) That at the time when the defenders employed Cameron as aforesaid to do the work they knew that he was in bankrupt circumstances, and took no steps to prevent his pledging their credit for the stones required for the work, but, on the contrary, allowed him to hold himself out as having their authority, and clothed him with ostensible authority as acting for them in the construction of the bridge: And Finds in law that the defenders in the circumstances were bound to see that Cameron paid for the stones supplied for said bridge, and are now liable in payment of the price thereof: Therefore repels the defences; decerns against the defenders for the sum of £43, 12s. 9d. sterling, with interest, in terms of the conclusions of the summons," &c.

His Lordship added this note:—"It is unnecessary in the special circumstances of this case to decide anything as to the general responsibility of a principal contractor for furnishings supplied to a sub-contractor employed by him to do his work, and without express authority to pledge his principal's credit. But the Lord Ordinary cannot assent to the doctrine contended for by the defenders, that the law, as a general rule, authorises contractors who have undertaken the execution of works under contracts like that which is here produced, to save themselves from all responsibility for the materials supplied for their contract by employing another to do the work and supplying the materials for a lump sum. He is of opinion that if they clothe the sub-contractor employed by them with apparent authority as their agent doing their work, they are bound either to see that he pays for furnishings supplied to him for their contract and on their credit, or to make it clearly understood that he has no power to pledge their credit, and is himself alone responsible to those from whom he may obtain such furnishings.

"In the present case it is clearly proved that the stones were supplied to Cameron on the credit of the defenders. They were ordered as for their contract, and charged to them in consequence of Cameron's statements. They would not have been supplied to Cameron upon his individual credit, and the defenders must be taken to have known that they would not be so supplied. For

Mr Best states in his evidence that he knew Cameron to be bankrupt in his circumstances at the time he gave him this job.

"It is also proved that the stones so supplied were in fact used for the purpose of the defenders' contract, and that to some extent they were so used by the defenders themselves after Cameron had left the place.

"It is further proved that the defenders received from the Forfar Police Commissioners payment for the whole works, including the stones supplied and used as above stated. The value of the portion of the work done by Cameron was £130, 15s., according to the defenders' own statement, and the payments made by them to Cameron amounted to £96, and were made from time to time, according to the amount of work which had been done to the satisfaction of the defenders' engineer.

"But it is said that the defenders gave no authority to Cameron to pledge their credit as he did, and that their payments to him included payment of the price of the stones supplied on his order.

"With regard to the former of these propositions the Lord Ordinary thinks it not conclusive that no authority was expressly given. No doubt one who deals with a mandatory ought to satisfy himself of the mandatory's authority.

"But if the defenders placed Cameron in such a position that he was possessed of ostensible authority from them, they must be answerable. They employed him to do their work and to use their plant; and if they gave him no express authority to order the stones in their name, they certainly took no measures to make those with whom he dealt aware that he represented himself alone, and possessed no authority to order materials for the execution of the work. Moreover, the Lord Ordinary feels bound to say that in the absence of any writing, and without calling Cameron as a witness, the defenders cannot expect the somewhat vague statements of Mr Best and Mr Gray to be accepted as conclusive evidence that Cameron had no authority. It is plain that Cameron must have understood differently, or else must have committed a fraud in telling the pursuer that the stones were for Scott & Best. His conduct would rather indicate that he understood he was to have a settlement with the defenders when the work was finished, and that there was nothing in the terms of his arrangement with them to prevent him making use of their names; and if Cameron could have given any evidence contradictory of the pursuer's statement and of the inference deducible from his conduct, the defenders ought to have called him. Mr Best's evidence shows that he would have had no difficulty in communicating with him.

"With regard to the effect of the defenders' payments to Cameron, it appears to the Lord Ordinary that if the defenders are responsible for Cameron's order in their name, those payments afford no defence against the pursuer's claim. No doubt where one has given money to a servant for the purpose of paying for furnishings instead of obtaining them on credit, there is authority for holding that the master will not be responsible for credit given upon the unauthorised order of the servant, unless there has been something in the course of dealing to justify the tradesman in

trusting to the servant's authority (*Mortimer v. Hamilton*, November 21, 1868, 7 Macph. 158). But if Cameron in this case had power to pledge the defenders' credit, as the Lord Ordinary thinks he must have had, the payments to Cameron will not avail to discharge the defenders of responsibility (*Heald v. Kenworthy*, 10 Exch. 739).

"The opinion of the Lord Ordinary is, that in the circumstances of this case the defenders were bound to see that their agent Cameron either obtained the supplies on his own responsibility alone, or paid for such supplies as he obtained. They were not entitled to take any benefit by his work and orders unless upon the footing of recognising his actings. And if they made payments to him without providing for the completion of his engagements to them, that is their fault. They had it in their power to secure themselves before making any payments to Cameron. But, in point of fact, the payments established in evidence are only partial payments made generally and indefinitely 'to account of work and materials.'

The defenders reclaimed, and argued—The relation of the parties was one of sub-contract, which was not a relation implying any right in the sub-contractor to bind the principal contractor, and the pursuer had recklessly accepted false representations by Cameron and must bear the loss he had thereby sustained. It would have been easy for him to learn the true position of Cameron had he made the inquiry to be expected of a prudent man. *Sibi imputet* therefore the loss. Even if Cameron had been a foreman, if he had acted without authority, he would not have made his master liable. The question in such a case, unless the party sought to be made liable has acted so as to induce others to believe he has given authority, is always, how far did the authority extend? The *onus* lies on the person seeking to charge one party for what he furnished to another to show there was such authority—*Debenham v. Mellon*, 5 L.R. Q. B. Div. 394; *Sinclair, Moorhead, & Co. v. Wallace*, June 4, 1880, 7 R. 874.

Argued for pursuer—The sub-contract was not proved. The defenders had allowed it to be believed that Cameron was a foreman with authority to bind them, and were barred from maintaining he was not so entitled. They had put Cameron into the position to commit this fraud, and therefore in a question between them and the pursuer they must bear the loss.

At advising—

LORD JUSTICE-CLERK—This is a tangled and ravelled affair, and certainly has been gone about in the most unsatisfactory, unscientific, and un-systematic way. But I am not prepared to disturb the interlocutor of the Lord Ordinary. I do not say I concur in all he states in regard to the matter, but I think that, looking to the nature of the transaction, and looking to the evidence, these stones were furnished from the quarry upon the credit of the defenders, and that the pursuer was entitled to trust to them in the circumstances in which the order was given.

It appears that the alleged sub-contractor, whose character as such I very greatly doubt, was at the date of the alleged contract in circumstances utterly bankrupt, to the knowledge of Scott & Best, who were the principal contractors

for the construction of the water-works at Forfar. It also appears that he came to ask Mr Best for a job—whether he could give him a job to keep him off the streets.

I beg leave to doubt very greatly whether Mr Best would ever have thought of entrusting a man in such circumstances with the power of making bargains for himself in regard to those important water-works, and that leads me to look, I do not say with suspicion, but at all events to look without much satisfaction, at the alleged verbal communings upon which the whole question turns.

It is quite true, Mr Best says, that having been asked to give this man a job, knowing him to be insolvent, he (Mr Best), whose firm are contractors for the construction of the new docks at Leith, said to Cameron, the alleged sub-contractor—"I have no work for you in Leith, but I have something to do at the water-works at Forfar." Upon that, without any further ado, they went over the estimate for the work connected with the bridge at Justinhaugh; and this bankrupt says to Mr Best—"I will do that work £40 cheaper than you contracted to do it for."

That was rather a singular kind of affair on the part of this man, and so Mr Best seems to have thought, for he immediately replied—"I think you had better think twice about that." No reconsideration, if there was any, altered the determination of the bankrupt, and both Mr Best and Mr Gray, an inspector at the new dock-works at Leith, who was present during the conversation, state that such was the result arrived at.

Now, the question, in the first place, is, Is that a sub-contract? Here, again, I say there is very great doubt—doubt about the footing on which this man was sent down to the water-works. That he was trusted with paying the workmen and ordering material was certain, but on what footing that was done I think very doubtful. But I think it lies with the defenders to make that matter clear. If they thought fit to make a bargain of that kind verbally without taking any precautions as to the details of it, and making it clear what was the footing on which they dealt with this man, the responsibility lies with them to effectually make it clear. They have produced no contract in writing. If Cameron had tried to enforce such a contract, doubtless we would have greater light upon it, but even then the result would, I think, have been doubtful. It has been said that the communings and communications here amount to a contract. But it may quite well be that a specific contract was never completed. There was no agreement, and no contract to make any payments during the progress of the work. According to the statement we have of the verbal arrangement, payment was not to be given until the end of the work. We know that certain payments were made in the course of the work, but on what footing those payments were made has not been cleared up in the least degree, especially in view of the other fact I have mentioned, that the payments were to be made at the end of the work. But whether the parties intended a sub-contract or not, of this I am quite clear, that these contractors (Scott & Best), as honest men, knowing the circumstances of this man to whom they paid their money—knowing that he had no means of meeting any demand except the money they entrusted to him if they chose to pay him before

the end of the contract—were in duty bound to see that their instalments were properly applied, and I cannot, from anything I find in the case, come to the conclusion that they must be relieved of the liability they incurred.

Now, that is the general view I take of this matter, and it appears to me that it is greatly corroborated, first, by the correspondence that took place in regard to this affair, and secondly, by the admitted and uncontradicted actings of Cameron himself.

In the first place, it was not a pure sub-contract. That is quite clear, because material was to be furnished to Cameron by the defenders themselves. The contractors were to furnish the cement, and I rather take it from the look of the accounts that that was a very material item in the furnishings that were to be made. The commencing took place in the month of August, and we find Mr Best writing to Mr Main on the 12th September 1879—"Say to Cameron the bridge is to be built in lime, which I will order." So that not only were they to furnish cement, and make a certain allowance for it, according to their own statement, but they considered they had the power, after the completion of the contract, to alter the material to be used and to furnish it themselves.

In the next place, it is clear that Cameron represented, not only to the pursuer, but to all and sundry, that he was only the foreman or a foreman of the defenders, and that it was on the footing that he was such that the goods were to be furnished.

So standing the case, I think the Lord Ordinary has rightly held that the credit of the defenders was interposed to those actings of Cameron, and that they did not take the necessary steps, knowing the circumstances in which he stood, to see that the money they paid him was honestly applied. I do not think that the sub-contract in point of fact, in its proper sense, is proved. I think the parole testimony falls short of the proof of any contract which should receive effect here. I am satisfied, also, that the defenders were not entitled to allow Cameron to go and order goods, and take no precautions for the application of the instalments paid to him, because they must have known that if any one of the parties dealt with had known that it was a sub-contract he was acting upon they never would have trusted Cameron and supplied him with the stones.

Those are the grounds on which my opinion rests. It would be a matter of law that if this was a completed sub-contract the sub-contractor would be liable to those from whom he got supplies, and the principal contractors would not be liable. That would be conceded at once. But I think, as I have explained, that the proof is insufficient to warrant any such conclusion. I am of opinion that in the circumstances the sub-contract could not have been completed, or, at all events, was not completed with this man; and that it was not fair dealing, as regards those he came in contact with, to give them the means of forming the opinion that it was not on his credit but on the credit of his employers that they were to rely.

LORD YOUNG—The summons in this case demanding payment of this account concludes for the sum of £43—a very small sum indeed to be

the subject of so much litigation. Probably twice or three times as much money has already been spent on the dispute. The summons demands payment of the "sum of £43, 12s. 9d. sterling, being the amount of an account for stones supplied by the pursuer to the defenders, or for which they are responsible." If those stones were supplied by the pursuer to the defenders, undoubtedly the defenders are responsible; otherwise they are not, unless there be some ground of liability—and I shall inquire into that immediately—on which they are responsible upon some other contract than that of sale.

The pursuer sold the stones and delivered them, and his first and leading ground of action is that he sold and delivered them to the defenders. If that is not so, I shall inquire immediately whether there is any other ground of liability within this record.

Now, were the stones sold and delivered to the defenders. The evidence is that they were sold and delivered to a man called Cameron, who stated that he was the defenders' foreman, and had authority to order the stones for them—that is to say, to purchase the stones for them. If that be true, then the pursuer's leading ground of action is made out. The stones were sold and delivered to the defenders—that is to say, they were ordered by a man in their employment, and having authority to enter into this contract. Now, is that true? The pursuer of the action very properly in his evidence puts his whole case upon the question whether that is true or not. Cameron told him he was Scott & Best's foreman; and at various parts of his evidence he says it was only because of the authority he said he possessed that he gave him the supplies—"If I had been told that Cameron had a sub-contract from Messrs Scott & Best for building the bridge, I would not have supplied the stones to him without security. I never heard that he was a sub-contractor. . . . It was entirely because of his statement that I gave the supplies. (Q) Was there anything else you trusted to except Cameron's statement and the report in the district that Scott & Best were the contractors for the work?—(A) Nothing else."

Now, was the statement which according to this evidence Cameron made to the pursuer a true statement in point of fact or not?

The defender Mr Best—and he is confirmed by Mr Gray, a witness who was present on the occasion when the contract was made—swears that it is not true, but that, on the contrary, the truth is there was a sub-contract. What the pursuer swears is that had he known it was a sub-contract which Cameron had he would never have supplied him with stones.

Now, it is quite true that Cameron was at the time the sub-contract is alleged to have been made in insolvent circumstances, although upon the same evidence on which I say that I also see that he stated that he expected upon a settlement to get £200 or £300. That contract was not of such a character that I feel at all surprised that respectable tradesmen, such as I assume the defenders to be, should have made it with a man in Cameron's circumstances. It was but a small matter. It was to build a bridge, the whole expense of which was a little over £200—a bridge to carry a pipe over the Esk. That was the whole cost of it, and it was expected to be completely

executed in about six weeks. The whole money involved was under £300—something between £200 and £300. Well, may honest men not make such a contract as that with a man who is in insolvent circumstances? A man in insolvent circumstances who has got any friends may very well get all the supplies which are needed for the execution of such a contract upon such short credits as may be necessary. I must say I cannot conclude anything against the truth or the honesty of the statement of the defenders from Cameron's circumstances.

Besides, it must not be lost sight of that the sworn testimony of Mr Best and of Mr Gray, the gentleman who was present on the occasion, is that Mr Cameron sub-contracted—that is to say, engaged not to give his personal services upon wages, which is the only other alternative. He did furnish the work and the materials to build a bridge for an agreed-on sum, according to the schedules in the contract with the defenders themselves, that is, the principal contract. Now, if that is true, Cameron was a sub-contractor; and, with deference, it was a pure sub-contract—not at all anything else. Though the defenders agreed to let him have the cement at cost price, he was still to furnish the cement and to pay for it. It was included in the contract price; and they said—"Instead of your going to strangers and buying, we will give you the advantage of letting you have it at cost price if you pay us for it." If that was not a sub-contract, what was it? "You build this bridge according to schedules in the contract with us—that is, as contracted for by us—for a fixed sum of money." It happens to be £40 less than the sum in the principal contract; but had it been the precise sum or more,—for sub-contracts are sometimes for more—it would have been just to do the contract work at a certain slump price. It is a slump contract.

Well, this evidence is false, or the contract was a sub-contract or nothing else. Now, I do not conclude that the contract was false, or that the evidence I have referred to is false. And I do not conclude that there was any trickery because of Cameron's circumstances. Now, I ventured to point out in the course of the argument more than once that we had had no suggestion hitherto of any other contract, if that was not a sub-contract. There is no evidence to the contrary of what I have referred to—none in the world. Cameron went and acted exactly as a man would act, except in the case of his representations about the defenders being his principals, who had a sub-contract. He was paid from time to time, not wages as a foreman, but certain sums to account of the contract price—that is, for work and materials supplied for the whole of the sub-contract. Work and materials—the principal as well as the sub-contract was for work and materials.

Now, if what I say be true, Cameron had no authority to order goods upon the credit of the defenders—none at all. He may have done it, and misled the people to whom he went into supposing that they were entitled to rely upon the credit of the defenders, but he had no authority to pledge their credit; and it is not a correct use of language to say that the parties, however honest they were, supplied the goods upon the defenders' credit. They supplied the goods in the belief that they were on their credit—the

defenders' credit. That may quite well be, but supplying goods on the credit of another man when he has pledged his credit, or when somebody else authorised to do it has done it for him, and being deceived into relying upon credit which he had no right to rely upon—that is to say, as in a question with the person whose credit is involved—are very different affairs.

It appears to me that the defenders have the best of it here. If the evidence about the sub-contract is false, then *cadit questio*; and it would be a false proceeding—it is but another way of saying it was false to say it was a trick—to put a man into a position where he would deceive others. But if the evidence is true, and there was no trickery, then Cameron was a sub-contractor bound to implement his sub-contract, and having a demand against the defenders for the contract price, and having no authority in the world to pledge their credit for any furnishings of stone or anything else.

But the defenders may be under some other ground of liability, and the most obvious ground that one can conjecture is, that they so acted as to give the pursuer reason to believe that Cameron was entitled to order things on their credit. Now, did they so act? What is the thing they did or the word they uttered, which can be construed into misleading the pursuer into the belief that Cameron had, what in fact he had not, authority to pledge their credit. They never had any communication with him. And the pursuer very candidly states—"I relied entirely on what Cameron said to me himself—upon no representation of the defenders; with them I never had any communication. I relied upon nothing under heaven except Cameron's statement"—which statement, if the evidence I have referred to is true, was a false statement.

Then, if Cameron neither had the authority of the defenders, nor the defenders so conducted themselves as to give the pursuers reason to believe that he had, how shall they be liable because he did not tell them he had not the authority of Scott & Best? It is a proposition to which for my part I can give no assent, that a person who has given another no authority to pledge his credit, and who has given another no reason to believe that he had that authority, is under any obligation to proclaim that he had not that authority. The pursuer is, in my opinion, in no different position from that of the shop-keeper who had furnished Cameron with nails or any other materials, to whom he may have gone and said—"I order such and such goods for Scott & Best"—in no different position at all. I quite understand that the pursuer thought he was safe enough, and the chances were very greatly in his favour. A man would not be expected just to come and tell them such a downright falsehood. The pursuers carted stones to Cameron's place, fully relying, I have no doubt, on the chances that things were all right. Those are just some of the risks which tradesmen sometimes run. Sometimes they are bit, but I suppose they expect that they cannot always escape. It may be that the pursuer anticipated no risk here, but whatever risk he ran he had himself pretty much to blame. Because if he wanted to be thoroughly safe, whatever Cameron's position was, his duty—at least his policy—was to inquire of the principals whom he said he represented, and whose

credit he said he was entitled to pledge, if they knew of what was being done in their name. They were within very easy reach of the pursuer. A reply would have reached the pursuer next morning. He could have sent a telegram to the defenders, and it would have been answered within an hour or half-an-hour. But pursuer chose to do no such thing, and I do not see how the defenders are to be blamed for having tricked him into believing Cameron, who said he represented them. If you just take the word of a man who comes and says—"Oh! I am the agent of a certain principal, and have authority to pledge his credit for certain goods which I am now to order, and order in his name;" and if you do not inquire of the principal at all, you take your risk of that proving to be true or not.

Now, I think when it turns out not to be true, as I am clearly of opinion that it turns out not to be true in this case—I say I think when that happens the loss must fall on the party who is deceived. I can find nothing in the world in the conduct of the defenders which can be called misbehaviour on their part or acting in such a way as to lead another on the ice, or which can subject them in a liability which did not originally attach to them. And as I have already pointed out, the pursuer himself frankly and candidly puts that out of the question by saying—"I relied exclusively upon what Cameron said to me, and nothing else."

Upon these grounds I am not able to assent to the judgment of the Lord Ordinary, which is, I should have thought, altogether inaccurate, for it affirms a sub-contract and nothing else, and if it is not affirmed that Cameron had authority to pledge the credit of the defenders, the conclusion is put upon language which I cannot properly understand, and upon a ground which I cannot quite comprehend, namely, that the defenders took no steps to prevent Cameron pledging their credit. He had no authority to pledge their credit. If he had authority to do so, what is the meaning of talking of taking no steps to prevent his doing it? If he had authority to pledge their credit, then upon a change of circumstances there might be some duty incumbent upon them to prevent him acting upon his previous authority for the future. But that is not the kind of case we have here at all. "They took no steps to prevent his pledging their credit for the stones, but allowed him to hold himself out as having their authority." Does that mean anything different than that they did not proclaim he had not? Surely a principal never proclaims that a sub-contractor has not his authority. It is for anybody who supposes the contrary to inquire whether the fact is so or not. "Clothed with ostensible authority as acting for them." Now, there was no more "ostensible authority" than any sub-contractor with the most formal written contract would have possessed by going to execute this contract upon the spot. In short, the pleas-in-law upon which the pursuer seeks to support his case appear to me to be altogether unfounded. The first in effect is, that "the pursuer having supplied the stones to the defenders, or their authorised representative," &c. That is excellent in law, but it fails in fact, and there undoubtedly liability would arise on the fact. Here is the second—"the said Alexander Cameron having held himself out to the pursuer as the

authorised representative of the defenders," &c. Now, I think that he had no authority. If he had authority, the case is under the first plea—he having that authority held himself out as the authorised representative of the defenders, and the pursuer having reasonable and sufficient ground for believing him to be so, and having supplied the defenders with stones, and so on, they say the defenders are liable. Now, I cannot assent to that for a moment. If he had the authority, then he pledged their credit; if he had not, the fact that he deceived the pursuer by holding himself out as having an authority which he had not cannot subject the defenders in liability. Nor can the reasonableness nor sufficiency of the pursuer's grounds for thinking he had affected the defenders, unless they are attributable to statements by the defenders themselves; and the pursuer, I again beg to point out, says—"There was nothing in their conduct to which I trusted—I trusted only to the man's own statement."

On these grounds I, with respect, find myself compelled to differ from your Lordship and the Lord Ordinary.

LORD CRAIGHILL—I concur in the result at which your Lordship and the Lord Ordinary have arrived. The case is a peculiar one in some of its circumstances; but it does not appear to me that there is any difficulty in affirming the ground upon which the conclusion at which I have arrived may be said to be rested.

Though I support the Lord Ordinary in the result at which he has arrived, I do not by any means hold myself committed to all the expressions to be found in his explanation of his judgment. I shall endeavour to explain the views upon which I have the opinion about to be given.

So far there is no controversy, and hence no difficulty, in regard to the facts of the case. The defenders, Messrs Scott & Best of Leith, were contractors with the Water-works Corporation of Forfar for the execution of the works necessary to bring in water to the town. Part of the general contract was for the erection of a bridge at Justinhaugh, along which the pipe was to be carried.

Now, although there was no power given expressly by the Forfar Corporation to sub-contract, yet while the works were in progress Scott & Best thought it expedient that a sub-contract should be entered into—at least that is Mr Best's explanation of the matter—for I assume that so far what he has said on this subject may be taken as a true representation of the state of matters. According to his statement, what followed was that there was an unconditional sub-contract entered into with Cameron. In this statement he is corroborated by Mr Gray. The import of what was thus concluded was, that all the work for the performance of which Scott & Best were under obligation to the Forfar Corporation, in so far as the erection of the bridge at Justinhaugh was concerned, was transferred from Scott & Best and assumed by Alexander Cameron. Accordingly, what we find set forth in the record with reference to this matter is the statement which I am now about to read in defenders' answer to the second article of the pursuer's condescendence. The defenders there say—"Explained that Alexander Cameron, who was a

builder in Leith, contracted with the defenders for the erection of the bridge in question. Explained further that the whole of the materials and workmanship of the bridge were under the contract to be supplied by the said Alexander Cameron. In accordance with the said contract the stones in question were supplied by the said Alexander Cameron, and he has been paid by the defenders for all the work done and material supplied by him under the said contract. It is explained further that the said Alexander Cameron never had, and never on any occasion was he represented by the defenders as having, any authority from them to order materials in their name or for their behoof." That is the defence, and the ground of the defence, and I apprehend that if that alleged contract is established there can be no doubt whatever that Cameron when he ordered the stones, as he did, from the pursuer, was not entitled to pledge the authority of the defenders, because the building of the bridge had ceased to be their affair and had become his own.

The ground on which the pursuer says he was entitled to look to the defenders is this, that the defenders were the only contractors that he knew anything about; that he knew nothing about the sub-contract; that a person representing himself to be the representative of the defenders came and ordered the stones which were used in connection with this work; that believing the authority which was said to be possessed by Cameron was actually possessed, the stones were furnished upon the credit of the defenders.

There is no doubt whatever that the stones which were thus furnished were put in the bridge which was the subject of contract between the defenders and the Corporation of Forfar, and of the alleged sub-contract between the defenders and Cameron. Now, in the matter of proof, if that which the pursuer says is true, that this man came representing himself to be the servant of the defenders, and ordered these stones, and these stones were furnished for what in the end proves to be not his but the defenders' works, I do not think it can be contended that the defenders are not answerable. But they evade this liability which would result from these circumstances upon this ground, that there was a sub-contract existing between Cameron and the defenders at the time the stones were ordered, under which Cameron had become bound not merely to furnish the work, but also all the materials required for the completion of the contract.

If it had been merely a work-arrangement, the materials to be furnished by the defenders, it is plain that if the things were ordered by Cameron, and the things were supplied, not as Cameron's but as their things, and used in their work, the defenders could not escape liability.

The question therefore is, whether that contract which is the ground of the defence has or has not been established? If it has been established, then the defenders must be assoilzied. If, on the other hand, it has not been established, we are driven to consider this other question, whether the circumstances do not in substance amount to those put forward by the pursuer in his grounds of action?—in which case the pursuer is entitled to decree against the defenders.

Now, I have considered all the evidence which has been led in this case, and the argument which

has been so ably presented upon that evidence, and the conclusion to which I have come is this, that the contract said in the evidence of Mr Best to have been concluded between him and Cameron, and the import of which is set forth in the defender's behoof in this record, is a contract which, upon the evidence of the defenders themselves, has not only been proved, but has been disproved. We are not to be led away by any considerations in regard to the alleged completion of a sub-contract. The question is, not whether there has been any completion of the sub-contract, but whether this sub-contract has been proved or not? If there was a sub-contract, the defenders continuing to furnish material, and only charging the cost of those materials when the time of settlement arrived against Cameron, then for anything that appears the defenders must be liable.

Now, what is the fact with regard to the statement that the materials and the workmanship in connection with this bridge were to be supplied by Cameron?

In the first place we find—and there is no dispute about this—that not one of the pieces of plant was to be supplied by Cameron, and yet there are no reservations about that in the alleged contract. It seems to have been a matter of course that the plant which was required was plant which was furnished by the defenders.

But that although it goes a great way—I do not say it would be sufficient—is not all. Because immediately after the contract was concluded, or very soon after, we find, as has been pointed out by the Lord Justice-Clerk, the defender Mr Best writing to Mr Main, on the 12th September 1879, as follows:—"Say to Cameron the bridge is to be built in lime, which I will order." How does he come to give that order? Is lime not part of the materials to be supplied under the contract? Certainly it is. Without communication he takes upon himself to say—"I will give the order;" and yet Cameron is presented as a sub-contractor—who was the only person who had power over the works, who was to order everything that was to be required, and upon whom, or upon whose credit, all the materials were to be supplied. But we do not stop there. There is a letter dated 16th of September 1879—"We have got consent from the engineer to use Arden lime for the Justinhaugh Bridge. Please speak to Cameron as to what quantity he is likely to require, and we will get it ordered." Now there are two things made clear. In the first place, it is made clear that with regard to any change of materials the defenders thought themselves still entitled to act as masters of the work. There was no delegation of the work to Cameron, which according to the views of the defenders entitled Cameron to say—"This is an affair of mine, and not of yours, and there can be no change without my consent." The second thing that letter says is practically this, that "whatever quantity you (Cameron) may require, we shall order it." This, I think, puts Cameron very much in the position of one workman who is gone to by another workman, according to the orders of their common master, and asked what quantity of a particular material he would require. That is surely further proof to the effect that at least one portion of the material required was to be ordered, and being ordered by the defenders was to be supplied, on the credit of the

defenders; and I think that also goes to prove that the contract which is set forth in the record here is not only not a contract supported by the conduct of the defenders immediately after the alleged contract is said to have been concluded, but is entirely disproved by the course the defenders followed.

Then in the letter which follows, dated the 10th September, from Mr Best to Mr Main, the following occurs:—"I think I mentioned to you that Cameron has to supply and deliver all materials; any that you may give, cartages, &c., &c., please keep a correct note of." That language has, no doubt, been quoted in support of the contentions of the defenders, but does it amount to more than this, that whether he goes into the market or not, and as between him (Cameron) and the defenders, the materials to be used in the building of the bridge, if they supplied Cameron with them, were materials the value of which might be deducted when the settlement came to be made? But we find in other letters that Cameron was to be supplied with these materials by the defenders. And those are things which according to the contract, as sworn to by Mr Best, and according to the language in this record, were to be supplied by Cameron himself, and not by the defenders to any extent. Now, all the materials not being to be supplied by Cameron, and many and most important materials being to be supplied by the defenders, are we not driven to ask whether any of the materials were to be supplied primarily by Cameron himself? We know what Cameron's circumstances were when the alleged sub-contract was entered into, and his circumstances have not an unimportant bearing upon the questions raised here. He was a bankrupt. He could not get a shilling on his own credit, and although in dealings with contractors an affair of £213 is a very small matter indeed, yet it is not a very small matter to a man who cannot get credit for a shilling. Now, Cameron we find coming to defenders' door, not exactly begging bread, but begging some work, virtually to keep him from starving. The defenders say they forthwith entered into a contract with him. Now, is it possible that contractors like Scott & Best would enter into a contract believing that the contract would be executed, and that all the furnishings of materials necessary for the carrying out of the contract would be procured, by a man whose credit was not worth a shilling, without reference to the credit of the defenders themselves? Once we have it here admitted that there were materials to be supplied by the defenders on defenders' credit, the contract labelled by the defenders is, I think, substantially disproved.

But there is more still. Cameron received a certain amount of instalments in the course of his work. I am not insensible to the consideration that the payments that were received, and the manner in which these payments were acknowledged in the receipts, are difficulties in the way of the pursuer, but they are not insurmountable. I think these payments were made on the footing that it was impossible for Cameron to go on without intermediate payments. He continued the work for a time, and then practically deserted it, and when he did so there were stones—some of them at pursuer's quarry and some at the works—ordered, as the defenders say, at Cameron's

credit, and stones which in that view were Cameron's property. Now, how were these stones used by the defenders? They were used as their own. They do not say that the leave of Cameron was asked. On the contrary, it is all but admitted that Cameron was left out of consideration. Now, unless they had a title as owners, what was the title upon which they were authorised to interfere and take possession of the stones? They were as good as owners of those stones when they laid hands upon them and built them into their works; because the moment Cameron goes away they enter without any notice to the masons, and take possession. So far as the masons were concerned, they continued their employment; and the materials, in so far as the stones were concerned—which upon their view, as represented here, were supplied on the credit of Cameron, or at least not on the credit of the defenders, and which therefore were not the defenders' property—are materials which they deal with as their own. Then there is the payment of the arrears of masons' wages due by Cameron when he went away. Those masons were in Cameron's employment and paid by him, and when Cameron went away they were employed by the defenders as if all through they had been in their own employment. No doubt defenders tell us they did this simply out of consideration for the loss which those poor workmen would have sustained if the arrears had not been paid by the defenders. There is, however, no evidence to this effect afforded by the masons themselves. They have not been called as witnesses; and in the circumstances it appears to me that the only fact which we can take into account is the fact that wages which would not have been due by the defenders if Cameron had been a sub-contractor upon the terms alleged by the defenders were paid by the defenders as if the defenders themselves were still the persons for whom the work performed.

Looking to the whole facts in the case, and for these reasons, I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered.

Counsel for Pursuer—Macdonald, Q. C.—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defenders—Asher—Darling. Agent—T. J. Gordon, W.S.

Friday, February 18.

SECOND DIVISION.

SPECIAL CASE—M'LAREN & OTHERS AND PULLAR & OTHERS (TRUSTEES AND PATRONS OF LUCAS' TRUST).

Trust—Legacy—Repudiation of Conventional Provisions by Widow—Period of Conveyance of Residue.

A testator directed his trustees to pay a certain annuity to his widow, and directed certain legacies to be paid to such of the children of a person named as should sur-

vive his widow. She repudiated the provisions made for her in the settlement and took her legal rights. Two annuities were instantly payable out of the estate. The residue of the estate was directed to be paid on the death of the widow to the patrons of a charity. *Held* that on the repudiation by the widow of the provisions for her under the settlement the patrons of the charity were entitled to a conveyance of the residue "subject to existing and contingent interests."

Annuity Payable in Option of Trustees on the Occurrence of Certain Event.

Where an annuity was to become payable out of an estate on the death of the testator's widow, should the testator's trustees consider that the annuitant required the same, and the residue of the estate was to be conveyed to a charity—*held* that when the widow repudiated her provisions under the settlement and took her legal rights, the charitable fund was entitled to a conveyance of the estate under obligation to pay the annuity unless the testator's trustees should inform them that payment ought in their opinion to be withheld.

John Lucas, farmer, Corntoun, Bridge of Allan, died on 4th April 1878, survived by a widow but, without issue, leaving a trust-disposition and settlement whereby he conveyed to trustees his whole estate, heritable and moveable. By the fourth purpose of this deed he directed his trustees to pay certain legacies to his servants, and to pay annuities to two half-sisters. By the ninth purpose he directed his trustees "on the death of his widow to pay to the children of James M'Laren surviving at said period the sum of £100 each. The eleventh purpose was for payment to his widow, if there should be no children of the marriage surviving the testator, an annuity of £200, and the liferent of certain heritable property, any further income which the trust-estate might yield after satisfying these provisions and the expense of the trust to be accumulated during the lifetime of the widow and to form part of the estate. The deed then provided, failing children of the marriage and on the death of testator's widow, that the trustees should pay to her brother Robert Donaldson, presently residing in New Zealand, "provided he return to this country and reside here, and also provided my said trustees consider that he requires the same, and of which they shall be the sole judges, a free yearly annuity during all the days of his life so long as he remains in this country." The thirteenth purpose provided that failing children as aforesaid, and on the death of the testator's widow, the trustees should, "after paying and providing for the other purposes of this trust, pay, assign, and dispose the rest, residue, and remainder of my said means and estate to and in favour of" certain trustees "as perpetual trustees and patrons of the fund after mentioned, and for the following purpose, viz., for founding and maintaining with the said residue a fund or trust to be called 'The Lucas Trust.'" Then followed a number of provisions for the benefit of the poor of Bridge of Allan and the adjoining parishes of Logie and Leacroft, for whose benefit the "Lucas Trust" was to be founded.